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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES**

Appellant(s) : Thomas A. SHREINER et al. **On Appeal to the Board of
Appeals and Interferences**
Serial No. : 09/593,785 Examiner: Chi Q. Nguyen
Filed : June 14, 2000 Art Unit: 3635
For : EXPANSION JOINT COVER WITH MODULAR CENTER PLATE

AMENDED APPEAL BRIEF

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A M E N D E D A P P E A L B R I E F

On March 29, 2004, Appellants submitted a Notice of Appeal from the final rejection of claims 1-5, 8, 13, 14-16 and 19 contained in the Final Office Action issued by the U.S. Patent and Trademark Office on December 30, 2003 in the above-identified patent application. On July 29, 2004, Appellants submitted an Appeal Brief and an Amendment After Final, which amended claims 1-5, 8-10, 14-16, 19 and 20, and added claims 21-26.

In the November 16, 2004, Office communication, the Examiner declined to enter the proposed amendment, on the grounds that it raised new issues that would require further consideration and/or search and presented new claims without canceling a corresponding number of finally rejected claims.

On November 30, 2004, the Examiner notified Appellants, by telephone, that the Appeal Brief was non-compliant, because it referenced non-entered claims and failed to provide an acceptable statement of separate patentability, as required under 1.192(c)(7). The Examiner then suggested that Appellants submit a revised and compliant Amended Appeal Brief and Amendment After Final. Appellants wish to express their gratitude to the Examiner for notifying

them of the non-compliant aspects of the previously submitted Appellate Brief, thereby providing them with this opportunity to submit the present revised and compliant brief, pursuant to 37 C.F.R. § 1.1.192(d).

Accordingly, pursuant to 37 C.F.R. §§ 1.1.192(a) and (d), Applicants hereby timely submit three copies of the Amended Appeal Brief in support of the appeal of the final rejection of pending claims 1-5, 8, 13, 14-16 and 19. Appellants attach to the brief, pursuant to 32 C.F.R. § 1.1.192(c)(9) and MPEP § 1206, Appendices A and B, which contain clean copies of the finally rejected claims, before and after entry of the proposed Amendment After Final, respectively.

For at least the reasons set forth below, Applicants respectfully submit that the final rejection of pending claims 1-5, 8, 13, 14-16 and 19 should be reversed.

I. REAL PARTY IN INTEREST

The real party in interest is EMEH, Inc. of Lebanon, New Jersey (previously known as Construction Specialties, Inc.). EMEH, Inc. is the assignee of the entire right, title, and interest in the present application.

II. RELATED APPEALS AND INTERFERENCES

Appellants and the Appellants' legal representatives are unaware of any appeals or interferences related to the present application which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

III. STATUS OF CLAIMS

Claims 1-5, 8, 13, 14-16 and 19 stand finally rejected under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent No. 5,911,662 to Hallsten (the "Hallsten Patent"). Appellants appeal from this final rejection of pending claims 1-5, 8, 13, 14-16 and 19. Claims 9, 10 and 20 stand objected to as being dependent upon a rejected claims, but would be allowable if rewritten in independent form to include all limitations of the base claim and any intervening claim. The amendments to and addition of certain claims is described in the section below. A copy of all of the pending claims is attached hereto in the Appendix.

IV. STATUS OF AMENDMENTS

Subsequent to the issuance of the Final Office Action dated July 11, 2003, Appellants are filing contemporaneously herewith an Amendment after Final Office Action. In this Amendment, claims 1-5, 8-10, 14-16, 19 and 20 have been amended to provide these claims in better form for consideration, and not for any reason relating to patentability or to introduce any new matter that would require the Examiner to perform another search.

V. SUMMARY OF INVENTION

Generally, the invention described in the above-identified application is directed to an arrangement that bridges the expansion gap, and more particularly to an expansion joint cover which includes a plurality of frame members. (*See Appellants' specification, e.g., Abstract*).

The joint cover includes a pair of frames 10 and 12, one of which is installed in a recess 14 in a building member 16 on one side of an expansion gap 18 and the other 12 of which

is installed in a recess 20 in another building member 22 on the other side of the expansion gap 18. The frames 10 and 12 may be longitudinally continuous along the length of the gap 18, and can be aluminum extrusions of uniform cross-section along their lengths. The same cross-section may be used on both sides of the joint, one being reversed end to end with respect to the other. Each frame 10 can have a planar support portion 10a, an edge portion 10b that overhangs the gap 18, and an edge flange portion 10c at the edge of the support portion remote from the gap. Ribs 10d on its underside provide a standoff of the support portion from the bottoms of the recesses in the building members to facilitate accommodation of the frames to surface irregularities. The frames are secured to the building members by masonry anchors 24. (*See id.*, page 10, line 11 to page 12, line 5).

In particular, a cover 126/128 has a center plate 126 which is modular, in that it includes several separate formed members 126-1, 126-2, 126-3, ... 126-n, each of which is, e.g., rectangular in plan and of uniform cross section along its length. Each formed member 126-1, 126-2, 126-3, ... 126-n may have a planar web portion 126w, which provides a flat upper surface for a floor-covering material, and spaced-apart ribs 126r of inverted "T"-shape in cross-section. A groove 126g along one side edge and a flange or tongue 126t along the other side edge of each member 126 can mate to form a slip joint between adjacent pairs of formed members 126 when the modular center plate is assembled. (*See id.*, page 14, lines 9-23; and Figs. 2-4).

The cover 126/128 may have end frame members 126 that are coextensive with and joined to the end edges of the side-by-side formed members 128. The cover is supported on the frames 10 by a base leg portion 128bl of each end frame member. A pair of flanges form a groove 128g that receives an end lug of the gasket 60. (*See id.*, page 14, line 24 to page 15, line 3).

VI. ISSUES ON APPEAL

The issue on appeal is whether the Examiner failed to establish a *prima facie* case that claims 1-5, 8, 13, 14-16 and 19, which stand finally rejected under 35 U.S.C. § 102(b), are anticipated by the Hallsten Patent.

VII. GROUPING OF CLAIMS

Group I Claims 1-5, 8, 13, 14-16 and 19 (pending)

VIII. ARGUMENTS

1. Prior Art Relied on by the Examiner

The Examiner relies on the Hallsten Patent in his final rejections.

The Hallsten Patent relates to a modular cover for a tank. (*See* Hallsten Patent, column 1, lines 11-14). The cover 30 of the Hallsten Patent cover does not include a pair of frames “adapted to be secured to a building member.” The cover 30 includes a plurality of generally rectangular panels 32 arranged side-by-side to form the cover. The adjacent panels 32 are connected together by adjacent cross members 34. The panels are connected to the cross members by a special form of sealable connection which is discussed in detail below. The panels 32 are constructed from a plurality of planks 36 arranged edge-to-edge and aligned along the length of the cover. Side members 38 are located along the edges of panels 32 extending across the width of all of the planks in the panel. Each of the side members 38 includes means for receiving the ends of the planks, such that the planks may be supported by the side members solely at their ends. The side members 38 also include interconnecting means for connecting them, and thus the panels, to cross members 34, in such a way that a connection between a panel

and a cross member may be substantially gas-tight. (*See id.*, column 5, line 66 to column 6, lines 19).

The transverse support members 34 are preformed such that planks 36 are supported entirely at their ends by side members 38, which in turn are connected to cross members 34. The weight of an assembled cover is carried essentially entirely by the support members. The panels 32 may be constructed in such a way that they are substantially gas-tight, but may be sufficiently flexible that they are free to assume the form of a section of an arch or a dome. Arches and domes are preferred shapes for a cover. (*See id.*, column 6, lines 20-31).

As shown in FIGS. 3A and 3B of the Hallsten Patent, the planks 36 (which are formed from extruded aluminum) are provided with a tongue-and-groove arrangement for connecting them together. In particular, the planks 36 include a flat, or deck portion 48 having along one edge thereof an outwardly extending protrusion or tongue 50 and along the other edge thereof an outwardly extending groove 52. Downwardly extending stiffening portions 56 impart a predetermined structural rigidity to the plank. The planks are assembled together edge-to-edge by inserting tongue 50 in groove 52, without welds. The tongue 50 and groove 52 provide a firm, substantially gas-tight connection between planks 36, while providing a joint with sufficient flexibility that a multiplicity of the planks forming a panel is free to assume a slightly curved form. (*See id.*, column 6, lines 46-61). In addition side members 38 include a channel 74 for receiving ends 36A of the planks 36. (*See id.*, column 7, lines 38-39).

A rubber-like edge seal 368, also serving as a structural supporting member for a deck assembly, is configured to slide together with the outer side of the side member 372 as shown in FIG. 27 of the Hallsten Patent. The side member 372 is similar to the side members 38 described above, especially in receiving the ends of the planks 36, between upper and lower

flanges 376 and 378. The principal difference is in the generally keyhole shaped opening 380 at the lower, outer side of this member, which is shaped essentially rectangularity. (See *id.*, column 13, line 63 to column 14, line 6).

2. Relevant Case Law, Rules and Procedures

a. 35 U.S.C. § 102 Case Law

In order to render a claim anticipated under 35 U.S.C. § 102, a single prior art reference must disclose each and every element of the claim in exactly the same way. See *Lindeman Maschinenfabrik v. Am Hoist and Derrick*, 730 F.2d 1452, 1458 (Fed. Cir. 1984), emphasis added; see *Tights, Inc. v. Acme-McCrory Corp.*, 541 F.2d 1047, 191 U.S.P.Q. 305 (4th Cir. 1976); see also *Shanklin Corp. v. Springfield Photo Mount Co.*, 521 F.2d 609, 187 U.S.P.Q. 129 (1st Cir. 1975).

“A prior art publication cannot be modified by the knowledge of those skilled in the art for purposes of anticipation.” *In re Saunders*, 444 F.2d 599, 602-03, 170 U.S.P.Q. 213 (C.C.P.A. 1971); see also *Studiengesellschaft Kohle mbH v. Dart Indus.*, 549 F.Supp. 716, 216 U.S.P.Q. 381 (D. Del. 1982), *aff'd* 726 F.2d 724, 220 U.S.P.Q. 841 (Fed. Cir. 1984). It must be “clear that the missing descriptive matter is necessarily present in the ... reference.” See *Acromed Corp. v. Sofamor Danek Group, Inc.*, 253 F.3d 1371, 1383 (Fed. Cir. 2001), *citing Continental Can Co. USA Inc. v. Monsanto Co.*, 948 F.2d 1264, 1268-69, 20 U.S.P.Q.2d 1746, 1749 (Fed. Cir. 1991).

3. Issue on Appeal

Claims 1-5, 8, 13, 14-16 and 19 stand finally rejected under 35 U.S.C. § 102(b) as being anticipated by the Hallsten Patent. Appellants respectfully request that the Board reverse this rejection for at least the following reasons.

Appellants respectfully assert that the Hallsten Patent, fails to teach or suggest, much less disclose Appellants' invention, as recited in independent claims 1 and 13.

Appellants' invention, as recited in independent claim 1, relates to an expansion joint cover which comprises, *inter alia*,

a pair of elongated frames, one of which is adapted to be secured in the lengthwise direction thereof to a building member extending along one side of an expansion gap and the other of which is adapted to be secured in the lengthwise direction thereof to another building member extending along the other side of the expansion gap, and each of which frames has an elongated planar support surface extending along the expansion gap, and

an elongated cover that is adapted to span the expansion gap and is supported on the planar support surfaces of the respective frames for sliding movement of the frames relative to the cover in a direction transverse to the expansion gap

Independent claim 13 recites similar subject matter.

In clear contrast to Appellants' invention, the Hallsten Patent in no way discloses an expansion joint cover that includes, *inter alia*, **a pair of elongated frames, one of which is adapted to be secured in the lengthwise direction thereof to a building member extending along one side of an expansion gap and the other of which is adapted to be secured in the lengthwise direction thereof to another building member extending along the other side of the expansion gap**, as explicitly recited in independent claims 1 and 14. In clear contrast, the Hallsten Patent is explicitly directed towards a cover for an open-topped tank or other enclosure. (See Hallsten Patent, column 1, lines 57-59). Thus, such cover does not include a pair of frames

which are **“adapted to be secured to a building member.”** Indeed, the cover of the Hallsten Patent is only secured to a tank or another enclosure, but not to a building member.

Further, contrary to Appellants' claimed invention, the transverse support members 34 of the Hallsten Patent (allegedly equated by the Examiner to Appellants' claimed frames) are not located on different sides of the **“expansion gap.”** Indeed, the Hallsten Patent does not even mention, much less disclose the presence of any expansion gap, and explicitly teaches a cover for an open tank, i.e., a cover for an open-topped structure. Thus, the Hallsten Patent does not disclose the claimed recitation that one building member extends along one side of the expansion gap, and another building member extends along another side of the expansion gap. For example, the specification of the present application describes that an expansion gap may refer to a distance that the building members are spaced from each other, and states that “[t]he wider the expansion gap at the maximum excursion of the building members away from each other in an earthquake, the thicker the cover plate must be for a given load-carrying ability.” (*See, e.g.*, Appellants' specification, page 2, lines 16-19).

In the Final Office Action, the Examiner apparently does not give patentable weight to these recitations because "the limitation of the building member is not positively claimed; [and] the frame members 34 taught by Hallsten having supporting surfaces as noted by U and L and it is capable to cover an expansion joint." (*See* Final Office Action, page 3, last paragraph). Appellants respectfully disagree for at least the following reasons. First, the Examiner apparently fails to appreciate that each of the frames are structurally different from the transverse support members 34 of the Hallsten Patent (allegedly equated by the Examiner to Appellants' claimed frames) **are not adapted to be secured to a building member**, as explicitly recited in independent claims 1 and 13 of the above-referenced application. In contrast, the

members 34 of the Hallsten Patent are *only adapted (or structured) to be secured to an open-top tank or another enclosure*. Indeed, Appellants' independent claims 1 and 13 clearly recite appropriate structure of the claimed members, and thus must be afforded patentable weight. Thus, the Hallsten Patent fails to disclose at least such claimed features of the frames as recited in independent claims 1 and 13.

It follows that one the members 34 of the Hallsten Patent is not specifically adapted (or structured) to be secured to a building member, and another one of the members 34 is not specifically adapted (or structured) to be secured to another building member, as also recited in independent claims 1 and 13. Second, it is respectfully asserted that no term of the claim can be ignored for determining whether the Hallsten Patent discloses *each and every recitation* of the claimed invention. Thus, even if the building members provided in independent claims 1 and 13 may not be positively recited, the interaction between the claimed frames and the claimed building members must be also considered and described in the Hallsten Patent in order for the Examiner to satisfy his burden of proof that the Hallsten Patent discloses each and every feature of the claimed invention.

Therefore, Appellants respectfully assert that the Hallsten Patent does not disclose **“a pair of elongated frames, one of which is adapted to be secured . . . to a building member extending along one side of an expansion gap and the other of which is adapted to be secured . . . to another building member extending along the other side of the expansion gap,”** as recited in independent claims 1 and 13.

In addition, independent claims 1 and 13 also recite that the frames are adapted to be secured in **the lengthwise direction thereof to respective building members**. In clear contrast, the elongated support members 34 of the Hallsten Patent (equated by the Examiner to

Appellants' claimed frames) extend transversely across the open top of the tank (as shown in Figs. 1 and 2 of the Hallsten Patent), but not lengthwise along the sides of a gap as recited in independent claims 1 and 13. Again, the Examiner does not give patentable weight to this limitation. Appellants' claimed frames are *adapted to be secured to the respective building members*, and thus structured to be secured in the lengthwise direction of such building members. The Hallsten Patent does not disclose such features, and they cannot be ignored by the Examiner for at least the same reasons as provided herein above.

Independent claims 1 and 13 further recite that **an elongated cover is supported on an elongated planar support surfaces of the respective frames for sliding movement of the frames relative to the cover in a direction transverse to the expansion gap. Indeed, the Hallsten Patent** does not have any “elongated planar supporting surfaces” of the members 34 for supporting the planks 36 (apparently equated by the Examiner to Appellants' claimed surfaces) for sliding movement transverse to the support member 34. In particular, Figs. 4A and 4B of the Hallsten Patent disclose that the ends of the planks 36 are received at their ends in channels 74 of the side members 38 attached to the frame members 34. However, there is no disclosure in the Hallsten Patent that the planks 36 are slidably supported on the side members 38. On the contrary, the disclosure of the Hallsten Patent provides that the frame members 34 and the planks 36 are to be joined together in “a gas tight” manner. (See Hallsten Patent, column 7, lines 38-43).

Accordingly, at least for the reasons presented above, it is respectfully asserted that the Hallsten Patent does not disclose Appellants' invention as recited in independent claims 1 and 13 of the above-identified application. In addition, 1-5, 8 and 13, which depend from independent claim 1, and claims 14-16 and 19 which depend from independent claim 13 are also not disclosed by the Hallsten Patent for at least the same reasons discussed above.

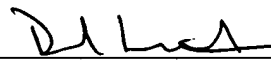
Therefore, Appellants respectfully request the Board to reverse the Examiner's § 102(b) rejection of claims 1-5, 8, 13, 14-16 and 19.

IX. CONCLUSION

For at least the reasons indicated above, Appellants respectfully submit that the invention recited in the claims of the present application, as discussed above, is new, non-obvious and useful. Reversal of the Examiner's rejections of the claims is therefore respectfully requested.

Respectfully submitted,

Dated: December 16, 2004

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APPENDIX A

Claims, as finally rejected:

1. An expansion joint cover comprising:

a pair of elongated frames, one of which is adapted to be secured in the lengthwise direction thereof to a building member extending along one side of an expansion gap and the other of which is adapted to be secured in the lengthwise direction thereof to another building member extending along the other side of the expansion gap, and each of which frames has an elongated planar support surface extending along the expansion gap, and

an elongated cover that is adapted to span the expansion gap and is supported on the planar support surfaces of the respective frames for sliding movement of the frames relative to the cover in a direction transverse to the expansion gap,

wherein the cover includes a modular center plate made up of a plurality of formed members, each formed member being rectangular in plan and of uniform cross-section along an axis in the transverse direction thereof and having side edges parallel to the axis, and the formed members being arranged with their side edges adjacent each other and with their ends overlying the planar support surfaces of the frame members for said sliding movement relative thereto.

2. The improvement according to claim 1, wherein adjacent pairs of formed members are coupled together by joints between the side edges.

3. The improvement according to claim 1, wherein adjacent pairs of formed members are coupled together by slip joints between the side edges.

4. The improvement according to claim 1, wherein all of the formed members of the modular center plate are of the same cross-section.

5. The improvement according to claim 1, wherein the modular center plate includes a continuous edge frame member affixed to each end of the plurality of formed members.

8. The improvement according to claim 1, wherein each of the formed members has corrugations.

9. The improvement according to claim 1, wherein each of the formed members has a plurality of transversely spaced-apart planar upper web portions, a plurality of transversely spaced-apart planar lower web portions staggered between the upper web portions, and a rib portion joining each edge of each upper web portion to an edge of each lower web portion.

10. The improvement according to claim 9, wherein the upper web portions of all of the formed members are coplanar and the lower web portions of all of the formed members are coplanar.

13. An expansion joint cover comprising:

a pair of elongated frames, one of which is adapted to be secured in the lengthwise direction thereof to a building member extending along one side of an expansion gap and the other of which is adapted to be secured in the lengthwise direction thereof to another building member extending along the other side of the expansion gap, and each of which frames has an elongated planar support surface extending along the expansion gap, and

an elongated cover that is adapted to span the expansion gap and is supported on the planar support surfaces of the respective frames for sliding movement of the frames relative to the cover in a direction transverse to the expansion gap,

wherein the cover includes a modular center plate that is made up of a plurality of identical formed members, each formed member being rectangular in plan and of uniform cross-section along an axis in the transverse direction thereof and having side edges parallel to the axis and the formed members being arranged with their side edges adjacent each other and with their ends overlying the planar support surfaces of the frames for said sliding movement relative thereto, and a continuous end frame member affixed to each end of the plurality of formed members.

14. The improvement according to claim 13, wherein each end frame member includes spaced-apart upper and lower flanges forming a groove and the formed members are affixed to the end frame members by reception of end portions thereof in the grooves.

15. The improvement according to claim 14, wherein each end of the modular center plate is supported on the support surface of the frame member by the lower flange of the end frame member.

16. The improvement according to claim 13, wherein each end of the modular center plate is supported on the support surface of the frame member by a rod of a rigid low friction polymeric material received in a partially open socket in the end frame member.

19. The improvement according to claim 13, wherein each of the formed members is corrugated.

20. The improvement according to claim 13, wherein each of the formed members has a plurality of transversely spaced-apart planar upper web portions, a plurality of transversely spaced-apart planar lower web portions staggered between the upper web portions, and a rib portion joining each edge of each upper web portion to an edge of each lower web portion.

APPENDIX B

Claims, after entry of proposed Amendment After Final:

1. An expansion joint cover comprising:

a pair of elongated frames, one of which is adapted to be secured in the lengthwise direction thereof to a building member extending along one side of an expansion gap and the other of which is adapted to be secured in the lengthwise direction thereof to another building member extending along the other side of the expansion gap, and each of which frames has an elongated planar support surface extending along the expansion gap, and

an elongated cover that is adapted to span the expansion gap and is supported on the planar support surfaces of the respective frames for sliding movement of the frames relative to the cover in a direction transverse to the expansion gap,

wherein the cover includes a modular center plate made up of a plurality of formed members, each formed member being rectangular in plan and of uniform cross-section along an axis in the transverse direction thereof and having side edges parallel to the axis, and the formed members being arranged with their side edges adjacent each other and with their ends overlying the planar support surfaces of the frames for said sliding movement relative thereto.

2. The expansion joint cover according to claim 1, wherein adjacent pairs of formed members are coupled together by joints between the side edges.

3. The expansion joint cover according to claim 1, wherein adjacent pairs of formed members are coupled together by slip joints between the side edges.

4. The expansion joint cover according to claim 1, wherein all of the formed members of the modular center plate are of the same cross-section.

5. The expansion joint cover according to claim 1, wherein the modular center plate includes a continuous edge frame member affixed to each end of the plurality of formed members.

8. The expansion joint cover according to claim 1, wherein each of the formed members has corrugations.

9. The expansion joint cover according to claim 1, wherein each of the formed members has a plurality of transversely spaced-apart planar upper web portions, a plurality of transversely spaced-apart planar lower web portions staggered between the upper web portions, and a rib portion joining each edge of each upper web portion to an edge of each lower web portion.

10. The expansion joint cover according to claim 9, wherein the upper web portions of all of the formed members are coplanar and the lower web portions of all of the formed members are coplanar.

13. An expansion joint cover comprising:

a pair of elongated frames, one of which is adapted to be secured in the lengthwise direction thereof to a building member extending along one side of an expansion gap and the other of which is adapted to be secured in the lengthwise direction thereof to another building member extending along the other side of the expansion gap, and each of which frames has an elongated planar support surface extending along the expansion gap, and

an elongated cover that is adapted to span the expansion gap and is supported on the planar support surfaces of the respective frames for sliding movement of the frames relative to the cover in a direction transverse to the expansion gap,

wherein the cover includes a modular center plate that is made up of a plurality of identical formed members, each formed member being rectangular in plan and of uniform cross-section along an axis in the transverse direction thereof and having side edges parallel to the axis and the formed members being arranged with their side edges adjacent each other and with their ends overlying the planar support surfaces of the frames for said sliding movement relative thereto, and a continuous end frame member affixed to each end of the plurality of formed members.

14. The expansion joint cover according to claim 13, wherein each end frame member includes spaced-apart upper and lower flanges forming a groove and the formed members are affixed to the end frame members by reception of end portions thereof in the grooves.

15. The expansion joint cover according to claim 14, wherein each end of the modular center plate is supported on the support surface of the frame member by the lower flange of the end frame member.

16. The expansion joint cover according to claim 13, wherein each end of the modular center plate is supported on the support surface of the frame member by a rod of a rigid low friction polymeric material received in a partially open socket in the end frame member.

19. The expansion joint cover according to claim 13, wherein each of the formed members is corrugated.

20. The expansion joint cover according to claim 13, wherein each of the formed members has a plurality of transversely spaced-apart planar upper web portions, a plurality of transversely spaced-apart planar lower web portions staggered between the upper web portions, and a rib portion joining each edge of each upper web portion to an edge of each lower web portion.